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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. CEDRIC JOHNSON, Defendant and Appellant.	B212011 (Los Angeles County Super. Ct. No. TA095220)

APPEAL from a judgment of the Superior Court of Los Angeles County, Ronald V. Skyers, Judge. Affirmed.

Kathy Moreno, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Steven D. Matthews and Herbert S. Tetef, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Cedric Johnson of first degree murder and attempted premeditated murder, both with attached findings that a principal discharged a handgun causing death, discharged a handgun, and used a handgun, and that the offense was committed for the benefit of a criminal street gang. The trial court sentenced Johnson to a total term of 50 years to life in the state prison. We affirm the judgment.

FACTS

The Gang Rivalry Setting

On January 27, 2008, members of the East Coast Crips gang and the Grape Street Crips gang were at a "flyer" party at a rented hall on East Florence Avenue. At about one o'clock in the morning, several Grape Street gang members ended up being shot, two of whom, Brandon "BL" Bullard and Bruce "Tanky" Adams, were killed. According to an investigating police officer, it was "a given" that there would be retaliation for Bullard's killing in light of his "status" in the Grape Street Crips gang, and, shortly before noon, a member of the East Coast Crips gang, Ezell "Easy" Ford, was shot near 66th Street and Broadway. Now it was back to the East Coast gang's turn.

The Charged Offenses

At about one o'clock in the afternoon on January 27, 2008, two members of the Grape Street gang, Mario "Gus" Proctor and Rashad Harris, were standing on the front porch of a house on 101st Street near Grape Street in the Jordon Downs housing project when a black Impala drove down the street. The Impala had tinted windows, a type of "tail," and paper license plates with black and gold letters. A minute after it first passed, the Impala came down the street again, this time stopping in the roadway across from the house on 101st Street where Proctor and Harris were standing. A black male, aged about 18 to 23 years old, five feet three inches tall, and weighing about 170 pounds, got out of the front passenger seat of the Impala, pointed a semi-automatic handgun over the top of the car, and fired several shots toward Proctor and Harris. Proctor was killed by gunshot wounds to his head, arm and knee; Harris suffered a gunshot wound to his hand. Shortly after the shooting, police reviewed videotape from cameras in the Jordon Downs housing

project. The videotape recorded a black car driving on 101st Street near Grape Street and then making a U-turn. The black car had a "raised object" on the trunk of the car.

On January 29, 2008, police arrested Daniel Colvin at his house, and impounded his car – an Impala with dark tinted windows, and an "object" on the back of the trunk. During a search of Colvin's house, police found two paper license plates with black and gold lettering. Police arrested Johnson at his apartment on January 31, 2008. During a search of the premises, officers found several items showing Johnson's connection to the East Coast Crips gang, including photographs of persons making gang signs, and papers with East Coast gang writing, and a printed document, "like an announcement," that had been printed from the "L.A. Times homicide blog." The "announcement" reported the killing of Brandon Bullard. Another two-page document contained "kind of a piece of history on gangs." Apart from the gang materials, Colvin and Johnson were both self-admitted members of the East Coast Crips gang.

Colvin and Johnson were placed in jail cells where their conversations and phone calls were secretly recorded. During the course of several conversations between Colvin and Johnson, and between Colvin and other persons, and Johnson and other persons, both Colvin and Johnson made statements indicating that they had been in the car involved in the shooting in which Proctor had been killed. A series of recordings of these jailhouse conversations was introduced at trial, and is discussed more fully below.

In June 2008, the People filed an information charging Colvin and Johnson with the murder of Proctor (count 1), with allegations that a principal discharged a handgun causing death, and that a principal discharged a handgun, and that a principal used a handgun, and that the offense was committed for the benefit of a criminal street gang. The information also charged Colvin and Johnson with the attempted murder of Rashad Harris (count 2), with allegations that a principal discharged a handgun causing great bodily injury, and that a principal discharged a handgun, and that a principal used a handgun, and that the offense was committed for the benefit of a criminal street gang. The charges against Colvin and Johnson were tried to a single jury in August and September 2008, at which time the People presented evidence establishing the facts

summarized above. On September 2, 2008, the jury returned verdicts finding Colvin and Johnson guilty as charged. On October 31, 2008, the trial court sentenced Johnson to a total term of 50 years to life in state prison.[1]

Johnson filed a timely notice of appeal.

DISCUSSION

I. Right to Confrontation

Johnson contends his convictions must be reversed because the introduction into evidence of secretly recorded statements uttered by Colvin while the two of them were in police custody violated Johnson's right of confrontation under *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*). We see no grounds for reversal because (1) we see no *Crawford* error, and, (2) assuming *Crawford* error, we see no prejudice.

A. The *Crawford* Rule

In *Crawford*, the Supreme Court held that the admission of a person's out-of-court statement into evidence against a defendant at trial violates the defendant's rights under the Confrontation Clause when the statement is "testimonial" in nature, regardless of whether or not the statement is otherwise admissible under a firmly rooted and recognized hearsay exception. (*Crawford, supra,* at p. 52.) A "testimonial" statement under *Crawford* includes testimony given from a preliminary hearing or grand jury proceeding, statements during police "interrogations" to develop evidence for a criminal proceeding, and any other statements which a reasonable person would believe could be used at a future trial. (*Ibid*.) Our state Supreme Court has construed *Crawford* to mean that a statement is "testimonial" when it is made for a purpose, and in a form, similar to testimony at trial, and it is given under circumstances with a degree of formality characteristic of such testimony, and it tends to establish facts having a possible use in a future criminal proceeding. (See *People v. Cage* (2007) 40 Cal.4th 965, 984.)

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[1] The trial court sentenced Colvin separately, and he is not involved in Johnson's present appeal. Colvin has filed a separate appeal, which is pending in our court.

B. There Was No *Crawford* Error

We disagree with Johnson that Colvin's recorded jailhouse conversations should have been ruled "testimonial" in nature. As we understand *Crawford*, "testimonial" does not mean the same thing as "incriminating." The conversations between two suspects in police custody simply do not have the same form or purpose characteristic of testimony at a preliminary hearing, or at a grand jury proceeding, or at a trial, nor are such conversations given in response to police interrogation designed to develop evidence for use at a future criminal proceeding. Johnson and Colvin did not anticipate that their conversations would be used in a future criminal proceeding. Quite to the contrary, they thought they were engaging in a private conversation that would not even be overheard.

Nor do we accept Johnson's argument that the police practice of surreptitiously obtaining statements in a jail cell is tantamount to obtaining statements by police interrogation. His attempt to bootstrap *Crawford* to fit the jailhouse context by pointing to the circumstance of police custody is not persuasive. Whether or not the police practice of listening in on a suspect's jailhouse conversations may pose any other potential issue, it does not implicate the Confrontation Clause as defined in *Crawford*. The conversations between Colvin and Johnson, or anyone else, were not "testimonial" in nature because they possessed none of the formalities associated with sworn testimony, nor would a reasonable person believe his or her statement were being collected for use in a future trial. (*People v. Cage, supra*, 40 Cal.4th at p. 984; see also *People v. Cervantes* (2004) 118 Cal.App.4th 162, 174; *U.S. v. Saget* (2d Cir. 2004) 377 F.3d 223, 229; and see *U.S. v. Hendricks* (3rd Cir. 2005) 395 F.3d 173, 181 [electronic surveillance tapes of conversations between an informant and defendants were not "testimonial" hearsay under *Crawford* because the conversations did not fall within nor were they analogous to any of the types or examples of testimonial statements discussed in *Crawford*].)

We reject Johnson's argument that the recent judgment and opinion of the United States Supreme Court in *Melendez-Diaz v. Massachusetts* (June 25, 2009, No. 07-591) ___ U.S. ___ [2009 WL 1789468], compels a different result. Although Johnson is

abstractly correct that *Melendez-Diaz* clarified that statements made outside the context of official police interrogation do not necessarily fall outside framework of "testimonial" statements within the meaning of *Crawford*, the circumstances present in *Melendez-Diaz* are not analogous to the jailhouse talks at issue in Johnson's current case. In *Melendez-Diaz*, the Supreme Court ruled that a lab analyst's report which had been introduced as evidence to show the composition and weight of an analyzed substance constituted a "testimonial" statement under *Crawford*. This meant, the Supreme Court further ruled, that the defendant had been entitled to have the analyst testify in court about the report, where he or she could have been confronted by the defendant on cross-examination. We agree that an analyst's report used to prove a drug offense is "testimonial" in nature, but we see nothing in the conversations between Johnson and Colvin (and others) which is of a similar character. While the analyst in *Melendez-Diaz* purposefully prepared his or testimonial report to be used against a defendant, Johnson and Colvin had no reasonable expectation or intention that they were preparing testimonial evidence against themselves.

C. There Was No Prejudice

Even assuming the existence of *Crawford* error in connection with the use of Colvin's words against Johnson, we find the error harmless under *Chapman v. California* (1967) 386 U.S. 18, 24, because *Crawford* did not prohibit the use of Johnson's own statements against himself, and Johnson's own statements showed his participation in the drive-by shooting of the victims in this case.

1. Johnson's Own Statements

Johnson's own recorded statements included the following admissions:

"That's what I was telling [the police searching my house] . . . . Well, how do you know . . . somebody didn't steal [Colvin's] car in the morning or something or that night or something and go do whatever they did. You don't . . . know that."

"That's why I was [thinking] in my head, like, his tint [is] dark. That's . . . all I was saying it's tinted dark. They can't see in that car. . . . [¶] They . . . didn't see me in that car. [The police were] trying to tell me I was in the car. I'm like, you didn't see me

in that car. Yes, I did. I said, no, you didn't. How do you know? I said, because I was at home. He said, are you sure you was at home? I know I was at home. And he like, he said, what's your cell phone. And I'm trying to trick him, right? I gave him my old cell phone number. He called it and it went through to my last machine. He said, you must have made a mistake. I said, why? He said . . . that cell phone number can verify where you was on Sunday. I said, but that's my old cell phone number, . . . I don't even use that cell phone no more, boy."

"It's a mess with the Grapes and the Coasters."

"Yeah. And they . . . thinking they killing Coasters, but, they killed an innocent bystander. They killed an innocent bystander in our hood."

"I'm like, I was thinking how the hell did [that] dude get killed and the other got shot in the hand?"

"[I]f I would have known there were cameras [in Jordan Downs], I would have gone somewhere else in Grape hood."

"When they showed [Colvin] the tape, they know . . . the only thing they got on tape was his car driving and it turning around. That's the only thing they got on the tape because if they got anything else on the tape of the killing, they would know that I didn't do it or he didn't do it. You feel me? [¶] But they only got his car driving around in there. He's going to say he was with me. Now, I'm in this motherfucker."

"The other dude told me they ain't got . . . nothing on me. [¶] I'm going to be on trial, I already know that. They ain't got shit on me, cuz."

"That's all. Because they . . . got a tape, right? And on the tape they show S.I. car driving in a circle and that's it. That's all the evidence they got, right? So they hounded this nigga. And they . . . showed me the tape, they said when they showed him the tape he dropped down to his knees and started crying. He said he was with me."

"I seen the tape. That tape . . . can't even go that far. [¶] They showed me, this is what they showed me. They showed me and him driving in there and that's . . . the only thing they got him driving and it got cut off. Because . . . no, look, the camera . . . let me tell you this, the camera is . . . no, because the camera is from far, far away. [¶] So they

had to zoom in. So they zoomed in and they got him just turning around and heading right back where the people was killed. In the tape, that's it right there. [¶] You can't see nobody's face in the thing, right? . . . [¶] . . . They put me in here with him. And I . . ain't trying to talk about him like he snitched or something you know because the police is lying. But when they put, they put . . . me in here with him."

"They told me and that's why I was trying to see if he up there. I know they got his car as evidence. The reason why I thought they was going to kill me cause when we was killin a nigga one of the homies accidentally shot the top of his car, so there's a bullet hole in the motherfucking top. So I'm like he said his car under investigation so I'm like sh. They check that, sh, they can match that probably . . . to BL's shooting. [¶] We thought we killed two of them . . . you know? The 17 Glock only had eight bullets and uh, the 38 had six, so that's like 14 bullets in the two of them. But one of them got shot in the hand and other one dead."

2. Analysis

Although somewhat rambling, Johnson's statements unmistakably establish his involvement in the shooting in Jordan Downs. He talks about the videotape extensively, trying to minimize its evidentiary value, but, in doing so, he establishes that he was in the car. He laments that he would not have gone to Jordan Downs had he known that there were cameras. His conversations show motive, and his knowledge of the shooting, and, both expressly and implicitly, his involvement in the crime. We are not persuaded that, had Colvin's statements been excluded against Johnson, the outcome of Johnson's trial would have been different.

We also note that Colvin's statements are not predominately direct accusations against Johnson. On the contrary, Colvin's statements largely consist of his admissions that he and Johnson were jointly involved in the shooting, in response to which Johnson regularly agreed. In other words, a large part of making sense out of Johnson's own words comes from considering those words in the context of the overall conversations between Johnson and Colvin. Johnson's argument that Colvin's statements should not have been admitted strikes us as a veiled suggestion that the conversations should have

been excluded in total, because his words and Colvin's words were irreparably entangled. Whatever prejudicial effect resulted from Colvin's words occurred not directly from those words, but from Johnson's agreement to what Colvin was saying. We are satisfied that no prejudice occurred from the use of Colvin's statements in-and-of-themselves.

II. CALCRIM No. 400

Johnson contends his convictions must be reversed because the trial court's aiding and abetting instruction — CALCRIM No. 400 — violated his constitutional right to due process, and his constitutional right to a jury trial. According to Johnson, it is reasonably likely that the jury understood the law to require "pegging" an aider and abettor's liability at a level of guilt "'equal'" to that of the actual perpetrator of a crime. In other words, Johnson argues that CALCRIM No. 400 told his jury that, if they found the actual shooter to be guilty of first degree murder, then they were required to find that any person who aided and abetted the shooter also guilty of first degree murder. This caused error, says Johnson, because "an accomplice may be convicted of a lesser offense than the [actual] perpetrator, even under . . . aiding and abetting liability . . . ." We are not persuaded by this argument that Johnson's convictions must be reversed.

A. The Instruction's Language

CALCRIM No. 400, as given by the trial court at Johnson's jury, instructed: "A person may be guilty of a crime in two ways. One, he or she may have directly committed the crime. I will call that person the perpetrator. Two, he or she may have aided and abetted a perpetrator, who directly committed the crime. A person is equally guilty of the crime whether he or she committed it personally or aided and abetted the perpetrator who committed it."

B. Johnson's Instructional Claim Is Forfeited

As a preliminary matter, it appears Johnson forfeited his claim of error on appeal by failing to object to this modification of CALCRIM No. 400 at his trial. As explained by Division Two of our court in *People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1163 (*Samaniego*), when considering whether the same alleged error was forfeited, a party must request appropriate clarifying or amplifying language to CALCRIM No. 400,

because it is an instruction that is correct in the law. But even had the issue been appropriately objected to, we find there was no prejudicial error.

C. The Instruction Should Have Been Modified To Fit the Murder Context

Johnson contends instructing with CALCRIM No. 400 is problematic because it suggests to jurors that an aider and abettor must be found "equally" guilty of the same crime as the perpetrator. For the reasons expressed by our colleagues in *Samaniego*, we agree with Johnson. As Division Two explained:

> "The Supreme Court reasoned [in *People v. McCoy* (2001) 25 Cal.4th 1111] that 'when a person, with the mental state necessary for an aider and abettor, helps or induces another to kill, that person's guilty is determined by the combined acts of all the participants as well as that person's own *mens rea*. If that person's *mens rea* is more culpable than another's that person's guilty may be greater even if the other might be deemed the actual perpetrator.' [Citation.] " '[O]nce it is proved that 'the principal has caused an *actus reus*, the liability of each of the secondary parties should be assessed according to his own *mens rea*.' " ' [Citation.] When the offense is a specific intent offense, ' "the accomplice must 'share the specific intent of the perpetrator'; this occurs when the accomplice 'knows the full extent of the perpetrator's criminal purpose and gives aid or encouragement with the intent or purpose of facilitating the perpetrator's commission of the crime.' " ' [Citation.] In the case of murder, the aider and abettor 'must know and share the murderous intent of the actual perpetrator.' [Citation.] [¶] Though *McCoy* concluded that an aider and abettor could be guilty of a greater offense than the direct perpetrator, its reasoning leads inexorably to the further conclusion that an aider and abettor's guilt may also be less than the perpetrator's, if the aider and abettor has a less culpable mental state. [Citation.] Consequently, CALCRIM No. 400's direction that '[a] person is *equally guilty* of the crime [of which the perpetrator is guilty] whether he or she committed it personally or aided and abetted the perpetrator who committed it" [citation], while generally correct . . . , is misleading [in a murder case] and should [be] modified [in that context]." (*People v. Samaniego, supra,* 172 Cal.App.4th at pp. 1164-1165.)

D. The Failure to Modify CALCRIM No. 400 Was Not Prejudicial

Although CALCRIM No. 400 may have had the potential to mislead the jury in the murder context presented by Johnson's case, we must still determine whether the instructional error was prejudicial. To the extent the instructional error affected Johnson's

constitutionally guaranteed trial rights, we must examine the effect of this error violation against the harmless error test set forth in *Chapman v. California, supra,* 386 U.S. at page 24. Under this test, we may not find the error harmless unless we are convinced beyond a reasonable doubt that the jury's verdict would have been the same absent the asserted error. (See. e.g., *People v. Samaniego, supra,* 172 Cal.App.4th at p. 1165.)

In the particular circumstances of Johnson's current case, CALCRIM No. 400 had the potential to suggest that the driver's liability for murder and attempted premeditated murder — as an aider and abettor — was "equal" to that of the shooter, whether or not the driver shared the same mental state for murder as the shooter. The error was harmless beyond a reasonable doubt, however, because the jury necessarily resolved the issue of Johnson's mental state against Johnson under other properly given instructions.

The trial court did not instruct with CALCRIM No. 400 alone and in a vacuum. The court also instructed with CALCRIM No. 401, which further explained to the jury: "To prove the defendant is guilty of a crime based on aiding and abetting that crime, the People must prove that . . . [t]he defendant knew the perpetrator intended to commit the crime," and that, "[b]efore or during the commission of the crime, the defendant intended to aid and abet the perpetrator in committing the crime." The court then also instructed with CALCRIM No. 520, further explaining to the jury: "To prove that the defendant is guilty of [murder], the People must prove that . . . [t]he defendant committed an act that caused the death of another person" and that, "[w]hen the defendant acted, he had a state of mind called malice aforethought." The court also instructed with CALCRIM No. 521, further explaining to the jury: "The defendant is guilty of first degree murder if the People have proved that he acted willfully, deliberately, and with premeditation." Finally, similar instructions were given to the jury about the elements required for attempted premeditated murder as charged in count 2 – CALCRIM Nos. 600 and 601. By convicting Johnson of first degree murder and attempted premeditated murder under these instructions, the jury necessarily found that Johnson had acted, either of his own accord or in the aid and assistance of another, willfully and with the intent to kill.

Apart from the rectification of any potential problem with CALCRIM No. 400 by the overall instructional charge to the jury, Johnson's defense did not rest on the issue of intent. As presented to the jury, the prosecution and defense in the case against Johnson and Colvin both recognized that the drive-by shooting was a gang-related, deliberate act in the context of a gang rivalry, and the predominant issue came down to whether or not the prosecution had proved that Johnson was one of the persons in the Impala that shot up the house on 101st Street. In other words, it was essentially undisputed at trial that both of the participants in the shooting on 101st Street shared the same intent to kill; Johnson's defense challenged the People's case that he was one of those participants. The potential impact that may arise from instructing with CALCRIM No. 400 in a case where shared or unshared intent to kill between perpetrator and aider and abettor is an issue did not exist in Johnson's current case.

In summary, the trial court's instructions on the general principles of aiding and abetting as outlined in CALCRIM No. 400 did not relieve the jury, under the court's other instructions, of finding that Johnson had the intent to kill at the time of the shooting.

III. Ineffective Assistance of Counsel

Johnson contends his convictions must be reversed because his trial lawyer fell below the constitutionally required level of performance by failing to object to a part of the prosecutor's argument. We disagree.

A. The Rules of Ineffective Assistance of Counsel

To establish entitlement to relief based upon a claim of ineffective assistance of counsel the burden is on the defendant to show "(1) trial counsel failed to act in the manner to be expected of reasonably competent attorneys acting as diligent advocates and (2) it is reasonably probable that a more favorable determination would have resulted in the absence of counsel's failings." (*People v. Lewis* (1990) 50 Cal.3d 262, 288; see also *Strickland v. Washington* (1984) 466 U.S. 668.) A defendant establishes a reasonable probability of a more favorable determination when he persuades a reviewing court that the result of his trial was fundamentally unfair or unreliable. (*Strickland v. Washington, supra*, 466 U.S. at p. 694.)

Where the record on appeal "sheds no light" on why counsel acted or failed to act in the manner challenged, a judgment is generally affirmed unless there simply could be "no satisfactory explanation" for counsel's actions. (*People v. Pope* (1979) 23 Cal.3d 412, 426.) This does not mean that a defendant is without further recourse. Where the record does not illuminate the basis for a challenged act or omission, a defendant's claim of ineffective assistance of counsel is more appropriately made in a petition for habeas corpus where there is an opportunity in an evidentiary hearing to have trial counsel fully describe his or her reasons for acting or failing to act in the manner challenged. (*Ibid.*)

B. The Prosecutor's Argument

Johnson's claim of ineffective assistance of counsel arises from the following passages in the prosecutor's argument:

- "One of the things that kind of happens in trials like this are we come in here and it's a nice place to be. [¶] We got . . . wood paneling. We stretch out. We kind of listen to the case. You see the defendants here in 3-D, their actual bodies, but when you step back from this and you really kind of analyze what this is all about and what's happening on our streets, it's really creepy what's happening."
- "The defendants took part in reducing the victim — you get to see [the defendants] in 3-D every day. You don't get to see the victim in this case. The victim in this case has been reduced to what I have in my hand. That's what you've been able to see of the victim: couple coroner's diagrams, several coroner's photos, two dimensional photo of what he looked like when he was living. Sometimes we forget what exactly it is. The gravity of what happened on a street in the middle of Jordan Downs that day."
- "Mario Proctor is hit in the head with a bullet and dies. We all know what that means. He's a victim. You [also] have a family that then has . . . their brother, their son gone. Well, they're obviously victims [too]. That's obvious."

- "You all sat here for about seven or eight days and heard about death and destruction. That takes a little bit out of you. That first . . . officer that arrived, Officer Frank Lopez, doesn't matter how many years he's been on, when he shows up and sees a victim laying on the ground with a bullet hole in his head dead, I don't care if you're on for five years or 50 years that's going to affect you. . . . This is going to take something out of you. Every person in that Jordan Downs area that has to listen to those gunshots on 101st has to deal with this, and it affects them. So, when it's People of the State of California versus the defendants, that is why."
- "This is not TV. This is not *The Practice*. . . . It's not about me. It's not about the defense attorneys. This is about justice, and unfortunately in this jurisdiction as soon as we're done with this case we're on to another. Unfortunately that's life in this area."
- "This is the extent we're at. Full tattoo proud of East Coast on Mr. Johnson. . . . If you're proud, then be proud now and deal with the consequences of being a gangster."
- "They made their stripes off the blood of somebody else's son. . . . In certain parts of this community in these streets the gangs run the streets. You've won. Okay? Is that what the gangsters want to hear? You've won. . . . But they do not have the courtroom, yet. We're not gonna lose the courtroom. We're not gonna do it today."
- "These streets that we're talking about are city streets. . . . This is what lends us to have certain places in the city off limits. What these two defendants did that day you can break it down into its barest elements as hunting. Hunting. Hunting for young men with no regard that that is somebody's brother, that is somebody's son. There are people out there that this [a]ffects."

C. Analysis

Johnson contends the prosecutor's statements "focused on two improper themes," namely "the impact of these offenses on the victim's family," and "the need to take back the streets from criminal street gangs." From Johnson's perspective, his trial counsel provided constitutionally ineffective assistance by failing to interpose objections when the prosecutor alluded to these "improper themes." We disagree for several reasons.

First, we find the overwhelming majority of the prosecutor's statements to have been permissible argument. The cases cited by Johnson do not support his proposition that it is improper for a prosecutor to urge jurors to protect community values, to deter violations of the law, or to preserve order in society. For example, *U.S. v. Koon* (9th Cir. 1994) 34 F.3d 1416, 1443, states the well-recognized rule that a prosecutor may not make comments calculated to persuade jurors to convict based on their passions or prejudices, rather than their objective determination of guilt; the case does not stand for the proposition that it is improper for a prosecutor to urge jurors to uphold law and order. We simply do not consider the prosecutor's comments at Johnson's trial to have entered into impermissible territory in a significant way. To the extent that the prosecutor's argument was not objectionable, Johnson's counsel was not ineffective for failing to interpose a meritless objection.

Second, to the extent Johnson is correct that it was improper to urge the jurors to think about the suffering of the victims and their families (see, e.g., *People v. Stansbury* (1993) 4 Cal.4th 1017, 1057), we decline to find ineffectiveness because the record does not show that Johnson's trial counsel simply could not have had an acceptable reason for remaining silent. Because many trial lawyers refrain — as a matter of tactics — from objecting during an opposing party's argument, a failure to object during argument is generally recognized to be within the wide range of permissible professional conduct unless the argument includes "egregious" misstatements. (*U.S. v. Necoechea* (9th Cir. 1993) 986 F.2d 1273, 1281.) Apart from deferring — where the record is silent as to reasons — to a decision not to object, the record in Johnson's case actually suggests that his lawyer deliberately chose not to object as part of his trial tactics. *During defense*

argument, Johnson's lawyer *agreed* with many of the themes advanced by the prosecutor. Johnson's counsel agreed that the gang crimes were "terrible things in our society," and agreed that there were "no winners in [the] case." Johnson's counsel then played on those very themes by reminding that jurors that, regardless of Johnson's gang lifestyle, they could not convict him merely because he was a gang member. We see nothing irrational about the strategy undertaken by defense counsel, and, thus, we see no trial performance below an acceptable constitutional standard.

Finally, assuming the prosecutor's argument was impermissible, and assuming further that Johnson's counsel performed deficiently by failing to object, we still decline to reverse the jury's findings of guilt because we are not convinced that the prosecutor's arguments contributed to the jury's guilty verdicts. In other words, we are not convinced that the outcome of Johnson's trial would have been different had his trial counsel acted in the manner in which Johnson claims his counsel should have performed. The evidence that the shooting in Jordan Downs was gang-related was properly introduced at trial, and, indeed, was an integral part of the trial. The prosecutor's arguments about gang culture, and the negative impacts of that criminal lifestyle, did not add significantly to the case, and was not independently inflammatory, and cannot be viewed as a contributing factor in the jury's guilty verdicts. We are satisfied that the jury convicted Johnson based on the evidence, and not because they were inflamed by the prosecutor's comments.

DISPOSITION

The judgment is affirmed.

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BIGELOW, J.

We concur:

RUBIN, Acting P. J.

BENDIX, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.